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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SIMON LEMONT JORDAN, Defendant and Appellant.	G055765 (Super. Ct. No. 17HF1110) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Beatriz M. Gordon, Judge. Reversed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Robin Urbanski and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of conspiring and attempting to commit a so-called "knock-knock" burglary with Jayshawn McKnight and Jason Wainwright. During his trial, the court allowed the prosecution to admit evidence McKnight committed a prior knock-knock burglary, even though appellant was not involved in that offense. We agree with appellant that the admission of this evidence infringed his right to a fair trial. Accordingly, we reverse the judgment.

FACTS

On the morning of July 31, 2017, Wainwright sent a text message to McKnight saying, "Let's go knock knock. U got a car. I got the area." A few hours later, Wainwright, McKnight and appellant arrived at the Laguna Niguel home of Aidan Gerard in a black Mercedes with mirrored windows and paper license plates. Wainwright went up to the front door and rang the doorbell several times. He also knocked repeatedly, and called out, "Is there anybody there? Anybody home?" Although Gerard heard Wainwright, he did not answer the door or give any indication he was home. Instead, he watched from his window as Wainwright returned to the Mercedes and McKnight repositioned the car in the driveway. McKnight, Wainwright and appellant then exited the car and walked up to the side yard of Gerard's house.

Speaking through an open window, Gerard asked the men what they were doing. Wainwright responded, "Is this Rancho Grande? We're trying to deliver a car there. Is this the right house?" Gerard told the men they were at the wrong house and his home was not on Rancho Grande.[1] At that point, the men returned to the Mercedes and drove away.

Gerard called the police, and within an hour, officers found the Mercedes parked about two miles from his home. McKnight was behind the wheel of the car, and Wainwright and appellant were not far away. Officers spotted them on a nearby sidewalk

[1] Gerard lived on Rancho Cristiano, which runs parallel to Rancho Grande.

and detained them for questioning. Appellant gave the officers a false name and was positively identified by Gerard as one of the men who was at his house earlier that day. Gerard also implicated McKnight and Wainwright in the incident.

All three men were charged with conspiring and attempting to burglarize Gerard's home. McKnight and Wainwright pleaded guilty; appellant did not. At his trial, the prosecution theorized he tried to pull off a "knock-knock" burglary with McKnight and Wainwright at Gerard's house on the day in question. As testified to by Sheriff's Investigator William Robb, knock-knock burglaries are committed by crews of two to four people. One person will knock on the front door of a home, and if no one answers, the others will break inside and steal things while the knocker remains outside as a lookout.

Appellant's defense was lack of intent. He did not testify or present any affirmative evidence to support that defense, but in closing argument counsel claimed he was simply an innocent bystander who got swept up in Wainwright and McKnight's scheme to burglarize Gerard's home. To refute that theory, the prosecution presented evidence McKnight was involved in a knock-knock burglary in Yorba Linda two months before the instant case arose. On that occasion, McKnight knocked on the victim's door, and when no one answered, his two brothers entered the home and stole small valuables while McKnight kept watch in the driveway. While the heist was going on, McKnight was seen talking on his cell phone and pacing back and forth in front of the same black Mercedes that was used in the Gerard incident. At appellant's trial, there was no evidence or argument appellant was involved in this prior burglary.

The jury convicted appellant as charged, and in a bifurcated proceeding the trial court found appellant had suffered a prior conviction for residential burglary. The court sentenced him to 92 months in prison for his crimes.

DISCUSSION

Appellant contends the trial court abused its discretion and violated his fair trial rights by admitting the evidence of McKnight's prior burglary in Yorba Linda. We agree.

When the admissibility of that offense was litigated before trial, defense counsel argued it was irrelevant and unduly prejudicial for lack of evidence linking appellant to it. However, the trial court determined the prior burglary was germane to the issue of intent and relevant to negate any claim of accident or mistake suggested by Wainwright's statement that he, McKnight and appellant were trying to deliver a car to a home in Gerard's neighborhood. As for the possibility appellant might suffer "some sort of guilt by association" by virtue of the prior burglary evidence, the court stated, "I don't believe that [] rises to the level of undue prejudice" within the meaning of Evidence Code section 352.[2]

Instructing the jury on this evidence, the trial court stated McKnight's prior burglary was admissible for the limited purpose of determining 1) whether "the conspirators acted with the intent to commit residential burglary in this case;" and 2) whether or not their actions were the result of accident or mistake. The court forbade the jury from using the evidence to conclude appellant had a bad character or was disposed to commit crime.

The problem with the first theory of admissibility – intent – is that it was overbroad. There can be little question the circumstances surrounding McKnight's prior burglary and the incident at Gerard's house were sufficiently similar to support the inference McKnight harbored burglarious intent on both occasions. But McKnight's

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[2] That section gives trial courts discretion to exclude evidence if its probative value is "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

prior burglary had no bearing on whether appellant intended to burglarize Gerard's home, which was the pivotal issue in the case.

The Attorney General does not argue to the contrary. Instead, he maintains the prior burglary was relevant to show McKnight was a coconspirator, i.e., to show McKnight intended to agree and did agree with appellant to burglarize Gerard's home. He may be correct about that, but the court's limiting instruction did not encompass that theory of admissibility, and the prosecutor did not advance it in his closing argument. It seems unlikely to us that the jury would have used the prior burglary for that particular purpose, and there is nothing to eliminate spillover into the intent issue.

The court's second theory of admissibility – absence of mistake – was similarly flawed. The evidence of McKnight's prior burglary was certainly relevant to refute the theory he was at Gerard's residence due to a mix-up. But it shed no light as to why appellant was there. Absent a logical connection to a material issue in the case, the evidence may have led the jury to believe appellant was guilty merely because he was associating with someone who had committed a knock-knock burglary in the past.

"Guilt by association is a thoroughly discredited doctrine[.]" (*People v. Chambers* (1964) 231 Cal.App.2d 23, 28.) The prospect of obtaining a fair trial is greatly diminished when, as here, the prosecution introduces evidence of an accomplice's prior crimes that are similar to the offenses for which the defendant is on trial. (*Id*. at pp. 27-31 [introduction of codefendant's prior crimes violated due process absent evidence connecting defendant to those crimes].) Because appellant was not involved in McKnight's prior burglary, the evidence regarding that burglary had no rational bearing on appellant's guilt and should have been excluded from his trial.

The Attorney General contends appellant forfeited his guilt-by-association argument by failing to raise it in the trial court. Although defense counsel did not explicitly use the term guilt-by-association in challenging the admissibility of McKnight's prior burglary, it was clear from his arguments he was concerned about that

issue, and the trial court specifically addressed it in its ruling. Under these circumstances, the forfeiture rule does not apply. (See generally *People v. Hopson* (2017) 3 Cal.5th 424, 458, fn. 6 [the purpose of the objection requirement is to alert opposing counsel and the court of the basis for the objection].)

The Attorney General also argues any error in allowing the jury to hear about McKnight's prior burglary was harmless because the evidence against appellant "was overwhelming." In so arguing, the Attorney General correctly notes the events at Gerard's house had the trappings of a knock-knock burglary, the excuse Wainwright gave to Gerard about being at his house was farfetched, and Wainwright's text to McKnight about wanting to "go knock knock[ing]" was highly incriminating. This evidence plainly established Wainwright and McKnight were up to no good. However, appellant never disputed that at trial. Rather, he maintained he was not a part of his companions' nefarious plan to burglarize Gerard's residence. And the evidence cited above was not convincing in terms of proving otherwise. There was no suggestion appellant was aware of the incriminating text message, and he never said anything to Gerard at the scene of the alleged offenses. Although appellant did lie about his name when he was arrested in the area, we conclude that fact is insufficient to prove the erroneous admission of McKnight's prior burglary was harmless.

Lastly, the Attorney General asserts the trial court's limiting instruction sufficiently mitigated any prejudice associated with the evidence of McKnight's prior burglary. According to the Attorney General, the instruction did this by informing the jury it could consider that evidence "for two limited purposes – neither of which permitted the jury to consider it alone as evidence of appellant's guilt." But both of those purposes related to intent, which was the only disputed issue in the case. Allowing the jury to consider McKnight's prior burglary on that issue was thus tantamount to allowing the jury to consider the prior in deciding appellant's guilt. This instructional framework can hardly be described as nonprejudicial.

Considering the record as a whole, we are convinced it is at least reasonably probable appellant would have obtained a more favorable result had the evidence of McKnight's prior burglary been excluded from his trial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Accordingly, the judgment against him cannot stand.[3]

DISPOSITION

The judgment is reversed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

[3] Given our conclusion in that regard, we need not address appellant's secondary argument regarding the retroactive application of a new sentencing law that became effective while his appeal was pending. (See Stats. 2018, ch. 1013, § 2, effective Jan. 1, 2019 [giving trial court's the discretion to dismiss a prior serious felony conviction in the interest of justice].)